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April 11, 1995

BY HAND

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

Re: DOMTEL Communications, Inc.'s Comments To Notice Of Proposed Rulemaking

Dear Mr. Caton:

Enclosed for filing please find the original and five copies of DOMTEL Communications, Inc.'s Comments to Notice of Proposed Rulemaking.

We appreciate your addressing any questions concerning this matter to the undersigned. Thank you.

Very truly yours,

Judith D. O'Neill

Enclosures

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	
Market Entry and Regulation of Foreign-affiliated Entities	IB Docket No. 95-22 RM-8355 RM-8392

COMMENTS OF DOMTEL COMMUNICATIONS, INC. TO NOTICE OF PROPOSED RULEMAKING

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Date: April 11, 1995

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SUMMARY

The new examinations proposed in the Commission's Notice of Proposed Rulemaking will add cumbersome and nebulous layers to a Section 214 application process which is already time consuming and particularly detrimental to U.S. carriers, such as DOMTEL, that are affiliated with small foreign carriers seeking to compete in their home markets. The Commission's proposed entry standard is likely to deter, if not completely eliminate, new foreign competitors at least in our hemisphere where U.S. Section 214 authority is essential to the economic survival of a carrier. This is inconsistent with two of the primary goals of the Global Information Infrastructure -- promoting competition and creating a flexible regulatory environment.

The Commission should not impose barriers upon small foreign carriers that are seeking to introduce greater competition into their home markets. Instead, the Commission should exempt all U.S.-carrier affiliates of nondominant foreign carriers from the proposed expanded "public interest" analysis. As proposed by DOMTEL, U.S.-carrier affiliates of nondominant foreign carriers would be subject to streamlined authorization procedures, i.e., a determination within six months, and a rebuttable presumption in favor of Section 214 approval.

A nondominant foreign carrier would be defined as a carrier that controls less than a 45% combined market share of basic services in their home market. In determining a foreign carrier's market share, the Commission would look at the carrier's market share averaged among local exchange, domestic and international long distance. By looking at the average market share among all basic services, the Commission would see a more accurate

picture of a foreign carrier's telecommunications market power in the country. This is particularly important for a new entrant in a foreign telecommunications market in the developing world where the former monopoly may exact excessive interconnection fees for termination in the public-switched telephone network ("PSTN"). As a result, a new entrant may have a fair share of the market with regard to a particular service, but with no ability to exercise dominance because it is economically hostage to the owner of the PSTN.

Finally, DOMTEL proposes that the Commission adopt a rebuttable presumption waiver for nondominant foreign carriers that seek to acquire up to a 60% ownership interest in the holding company of a radio licensee under 310(b)(4).

The Commission should not back pedal to an outdated xenophobic policy that existed in 1985, particularly for new carriers in emerging markets. This is particularly inappropriate at a juncture in which the U.S. Government is internationally preaching the virtues of competition and the need to dismantle regulatory barriers to create a Global Information Infrastructure. Indeed, the Commission specifically stated in the *International Common Carrier Services* decision that "competition, not governmental regulation, is the most effective, and therefore the most desirable, solution to market power."[1/]

1/ *In the Matter of Regulation of International Common Carrier Services,* Report and Order, 7 FCC Rcd 7331, 7334 (1992).

Before the
FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of	)	
Market Entry and Regulation of Foreign-affiliated Entities	)	IB Docket No. 95-22 RM-8355 RM-8392

COMMENTS OF DOMTEL COMMUNICATIONS, INC. TO NOTICE OF PROPOSED RULEMAKING

DOMTEL Communications, Inc. ("DOMTEL"), through its counsel, hereby submits its comments in response to the Notice of Proposed Rulemaking ("NPRM") issued by the Federal Communications Commission ("Commission") regarding the entry of foreign-affiliated entities into the U.S. international telecommunications market.[2/]

DOMTEL, a U.S. corporation, is the wholly-owned subsidiary of Telepuerto San Isidro, S.A. ("TRICOM") of the Dominican Republic. TRICOM, in turn, is 40 percent owned by Motorola and 60 percent owned by Dominicans nationals.

2/ *Market Entry and Regulation of Foreign-affiliated Entities*, FCC 95-53, Notice of Proposed Rulemaking (released February 17, 1995) [hereinafter NPRM].

I. Introduction

The Commission's NPRM sets forth three goals for the regulation of the U.S. international telecommunications market: "(1) to promote effective competition in the global market for communications services; (2) to prevent anticompetitive conduct in the provision of international services or facilities; and (3) to encourage foreign governments to open their communications markets."[3/] Of these, the Commission has specifically stated that the first goal -- the promotion of effective competition -- is the most important.[4/] DOMTEL agrees.

The U.S. telecommunications regulatory policy consistently has been in favor of open entry and competition. The Commission's approach has been to "lead by example" and it has worked. Today, as a result of DOMTEL's parent, TRICOM, competition exists in the Dominican Republic. It also exists in Chile, Mexico, Argentina, and the United Kingdom to name just a few. By December 31, 1997, competition in basic services is targeted for the European Union countries.

In the NPRM, the Commission states that it is "trying to avoid sending a signal that might be misinterpreted as a closing of our markets."[5/] However, that is the precise impact of the Commission's proposed actions, particularly for the foreign carriers that the Commission has been encouraging for years to enter the market and compete -- the small, nondominant foreign carriers. The Commission's NPRM is working at counter-purposes for these carriers -- when most of the world is doing exactly what the Commission

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3/ NPRM, *supra* note 2, at ¶ 1.

4/ *Id.* at ¶ 27.

5/ *Id.* at ¶ 48.

has been advocating for many years -- instituting competition -- the NPRM proposes barriers to entry, which keep out the new competitors it pushed to create.

The reason for this is that the NPRM adds layers of tests and new levels of interagency consultancy to an existing system that is already cumbersome and results in substantial delay. Moreover, the proposed elements are so subjective that they effectively create an insurmountable barrier for new small foreign carriers.

II. The Commission's Proposed Market Access Test Will Deter Competition Abroad If Applied to Non-dominant Foreign Carriers -- As to Them There Should be a Rebuttable Presumption in Favor of Section 214 Approval

Currently, any entity that seeks to provide facilities-based services between the United States and another country must seek authorization under Section 214 of the Communications Act. The Commission, in turn, grants a carrier authorization if it determines that approval of the application is in the public interest. This public interest analysis is conducted on a case-by-case basis. The case-by-case approach allows the Commission to address atypical issues uniquely and impose appropriate safeguards where the factual scenario warrants such conditions, whereas non-threatening applications can be addressed expeditiously. To date, the Commission has addressed complex issues, such as the British Telecommunications/MCI merger and the purchase of Telefónica Larga Distancia de Puerto Rico by Telefónica de España, by fashioning appropriate conditions to address any particular concerns that may exist.[6/] While this approach seems to work for powerful

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6/ As the Commission stated in the Telefónica de Larga Distancia Order, "[t]he public interest does not necessarily require that we deny the facilities-based entry of a U.S. affiliate of a foreign carrier where, as here it appears we can craft nondiscrimination (continued...)

international carriers, even the case-by-case analysis blocks entry of new, small, foreign, non-dominant carriers not aligned with a powerful partner.

For new, non-dominant foreign carriers that are not affiliated with a major international carrier their lack of lobbying resources already relegates them to the bottom of the decision-making list so that under current requirements a Section 214 approval takes over a year (DOMTEL has been waiting nearly two years at the date of this filing).[7/]

Indeed, the Commission states in the NPRM that the "case-by-case review of foreign carrier applications has caused uncertainty in the market due to the lack of a clear standard for evaluating applications by foreign carriers with different degrees of market power in their home markets."[8/] DOMTEL agrees. However, the NPRM makes it worse.

The Commission's NPRM imposes additional cumbersome and even more uncertain layers to its public interest analysis. Since none of these factors is dispositive, it is difficult to assess what greater certainty will be created for carriers seeking to obtain U.S.

6/(...continued)
safeguards sufficient to protect U.S. carriers in their provision of U.S. international service from discrimination that might occur as a result of such entry and the balance of public interest considerations weigh in favor of granting the application." *In the Matter of Telefónica Larga Distancia De Puerto Rico*, 8 FCC Rcd 106, 109 (1992) [hereinafter *TLD Order*].

7/ *In the matter of DOMTEL Communications, Inc.*, Application for Authority Pursuant to Section 214 of the Communications Act, File No. ITC-93-246 (filed July 7, 1993). DOMTEL filed a Section 214 application with the Commission in July 1993, to obtain authorization as a facilities-based provider. To date, this application has not been acted upon despite continuous pursuit by DOMTEL, the subsidiary of a new Dominican competitor to the former GTE-owned monopoly. The effect of Comments by GTE and a general Petition to Deny by AT&T has been to freeze the whole docket for close to two years.

8/ NPRM, *supra* note 2, at ¶ 23.

Section 214 authorization. Moreover, as defined, the proposed definition of "primary market" under the "effective market access" test does not specify what would constitute a "substantial or dominant market share." In addition, for U.S. carriers that are not affiliated with foreign carriers that fall within the definition of a primary market, because they do not possess a substantial or dominant market share in their home market, it is unclear what public interest analysis the Commission would conduct and whether the additional elements proposed by the Commission would apply to such carriers.

The creation of additional criteria, which may be applicable to carriers that have foreign affiliations without regard to the dominance of the foreign carrier, is directly contrary to the principles which drove the Commission to reject blanket classification of foreign-owned carriers as dominant for purposes of regulation.[9/] Given the numerous steps, the long list of factors, and the many participants that would be involved in reviewing the application, this proposed test, as outlined, will not create any greater certainty. Instead, the proposed examination lends itself, even more than the existing process, to be halted abruptly by the simple filing of a Petition to Deny or even a negative comment. The Commission is undermining itself by eliminating, or at a minimum, deterring new foreign carriers with such "closed border" regulation.

9/ In the regulation of *International Common Carrier Services*, the Commission chose to adopt a more equitable approach which would be applicable to all carriers regardless of ownership and would impose dominant classification only on those carriers that presented a "substantial risk" of discrimination based upon control of foreign bottleneck facilities. *In the Matter of Regulation of International Common Carrier Services*, Report and Order, 7 FCC Rcd 7331, 7332 (1992) [hereinafter *International Common Carrier Services*].

The six new factors (and another government branch review) which the Commission now proposes,[10/] is likely to discourage new foreign competitive carriers to whom the United States is a key market, from even establishing themselves. Just as was decided in *International Common Carrier Services*, the Commission's proposed test, with its numerous factors, will be "overbroad, unnecessarily burdensome and may be detrimental to competition" for new non-dominant foreign carriers.[11/]

III. The Commission's Expanded Public Interest Analysis Should Apply Only to Dominant Foreign Carriers as Properly Defined

Vice President Gore emphasized in his speech before the World Telecommunication Development Conference "the importance of a flexible, effective regulatory framework that can help ensure the continued openness of the more liberal foreign telecommunications markets, and promote the opening of closed foreign telecommunications markets to competitive entry."[12/] Indeed, in *International Common Carrier Services*, the

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10/ Such factors would include: "(1) whether U.S. carriers can offer in the foreign country international facilities-based services substantially similar to those the foreign carrier seeks to offer in the United States; (2) whether competitive safeguards exist in the foreign country to protect against anticompetitive and discriminatory practices . . . (3) the availability of published, nondiscriminatory charges, terms and conditions for interconnection to foreign domestic carriers' facilities for termination and origination of international services; (4) timely and nondiscriminatory disclosure of technical information needed to use or interconnect with carriers' facilities; (5) the protection of carrier and customer proprietary information; (6) whether an independent regulatory body with fair and transparent procedures is established to enforce competitive safeguards." *Id.* at ¶ 40 Then the liberalization factors would be looked at and the whole package would be sent to the Executive Branch. *Id.* at ¶ 45.

11/ *International Common Carrier Services, supra* note 9, at 7332.

12/ NPRM, *supra* note 2, at note 15 (*citing* Vice President Al Gore, Speech at World Telecommunication Development Conference (Mar. 22, 1994)).

Commission noted "the substantial competitive benefits that can result from lifting the burden of current regulation."

The Commission should acknowledge the significant economic and financial burdens imposed on a small company, such as DOMTEL, that must wait close to two years before the Commission can decide whether or not to grant a license request. U.S. carriers affiliated with small nondominant foreign carriers that possess a small market share should not be subject to such delay. It is contrary to the Commission's policy of promoting competition to impose more stringent regulation on U.S. carriers whose small foreign affiliates are seeking to compete with the dominant foreign carriers in their home markets. As such, the Commission should change the existing rules to streamline entry into the U.S. market for properly defined nondominant foreign carriers.

The way to do this is to rule that a foreign carrier that does not have a "primary market" (meaning, as defined in the NPRM, that it is not dominant in the home market) is not subject to the "effective market access" test, and will be treated expeditiously as if it were not a foreign-owned carrier. A rebuttable presumption should exist in favor of granting the Section 214 authorization for such carriers.[13/]

A carrier would be classified as dominant if it controls 45% or more of the combined basic services of the foreign market. For developing countries, market share

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13/ This is consistent with the Commission's policy. Indeed, even in 1985, the Commission acknowledged that nondominant carriers should be regulated less. "Our experience . . . gives us confidence that when a competitive environment exists the goals of the Communications Act are best satisfied by reducing, to the extent practical, entry, exit and general regulatory burdens for non-dominant carriers." *In the Matter of International Competitive Carrier Policies*, Report and Order, 102 FCC 2d 812, 823 (1985).

would be determined by the foreign carrier's revenue and subscriber base, as compared to the total national revenue and subscriber base for all basic services. The rationale for looking at the combined averaging of basic services is that in the developing world it would not be justifiable to look only at whether a carrier has control market by market. Generally, new carriers are in such a poor negotiating position that they must pay much of their revenue in one market to the former monopolist in their country as interconnection fees to terminate their traffic.

Accordingly, where a U.S. carrier makes a *prima facie* showing that its foreign affiliate is not dominant, meaning that it does not control 45% or more of the basic services in its home market on a combined average basis, then the foreign-owned carrier should be determined presumptively incapable of discriminating against other non-affiliated U.S. carriers. As such, entry into the U.S. telecommunications marketplace would be granted on a streamlined basis, i.e., in no more than 6 months time, and a rebuttable presumption in favor of granting the approval would automatically attach, so that self-interested large carriers (like GTE in the DOMTEL case) could not freeze the approval process merely by filing negative comments. Rather, they would have the burden of proof that the granting of Section 214 authority was detrimental to the U.S. public interest. Additionally, international facilities-based applications of U.S.-carrier affiliates of nondominant foreign carriers should not require the review and approval of the full Commission established in the *TLD Order*.[14/]

14/ In this Order, the Commission stated that "[d]ue to the unique public interest and market factors associated with international facilities-based authorizations, we clarify that facilities authorizations from entities affiliated with foreign carriers will require review and approval by the full Commission." *TLD Order, supra* note 6, at 113.

IV. Section 310(b)(4) Should be Modified to Allow Nondominant Foreign Carriers Up to a 60% Foreign Ownership Interest

Under Section 310(b)(4), the Commission has the discretion to allow more than a 25% interest in the holding company of a radio licensee. The Commission's NPRM questions whether the "effective market access" test should be imposed to determine whether to allow foreign carriers to go beyond the 25% benchmark. DOMTEL believes that it should not.

DOMTEL proposes that the Commission adopt a presumptive waiver for nondominant foreign carriers that seek to obtain ownership in the holding company of a licensee. The waiver would allow nondominant foreign carriers of developing countries to hold up to a 60% ownership interest. This would allow U.S. carriers to take smaller stakes and have less investment exposure in the U.S. affiliates of nondominant foreign partners from developing countries (in which U.S. carriers see future market opportunities, but are risk averse to heavy present investment).

V. Conclusion

As Vice President Gore stated in his speech at the G7 Summit, "building the GII is going to require robust competition. And you cannot create robust competition by excluding competitors, whether those competitors are at home or abroad." The Commission's proposed test would do just that.

The United States has been at the forefront of open competition. Its policy is evident in the Commission's decisions, in Chairman Hundt's speeches, and in the Administration's policy documents (e.g., National Information Infrastructure: Agenda for

Action and the Global Information Infrastructure: Agenda for Cooperation). Now that the tide around the world is turning towards competition, the Commission should not take a backward step and adopt an entry test solely directed at foreigners. Couch it as the Commission may, this proposed "effective market access" test for Section 214 applications inevitably will be regarded as an example of "do as I say, not as I do."

In particular, the Commission should not penalize nondominant foreign carriers, particularly from developing countries, that are seeking to introduce greater competition into their home markets by imposing this time consuming, costly, and burdensome entry test. Instead, such foreign carriers should be rewarded for their efforts aimed at introducing greater competition. U.S. carriers with nondominant foreign affiliates should be exempt from the proposed elements that would expand the public interest analysis, i.e., the "effective market access" test, and should be exempt from the requirement that facilities applications from entities affiliated with foreign carriers are subject to review and approval by the full Commission.

In addition, U.S. carriers with nondominant foreign affiliates should be subject to streamlined procedures with a rebuttable presumption of public interest in their favor. For purposes of determining a foreign affiliate's classification, a dominant foreign carrier would be defined as any carrier having a 45% or more combined average market share of total combined national local exchange, domestic and international long distance markets.

Finally, with regard to Section 310(b)(4), the Commission should presumptively grant waivers to allow up to a 60% foreign ownership interest in the holding company of a radio licensee, if such foreign ownership is held by a nondominant foreign carrier of a developing country.

Respectfully submitted,

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DOMTEL Communications, Inc.

Date: April 11, 1995

CERTIFICATE OF SERVICE

I, Janet Hernandez, do hereby certify that a copy of DOMTEL Communications, Inc.'s Comments To Notice Of Proposed Rulemaking, dated March 11, 1995, was hand delivered (*) or sent by United States mail (**), postage prepaid, to the following:

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